NC: 2024:KHC-K:8098-DB
CRL.A No. 200109 of 2014

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IN THE HIGH COURT OF KARNATAKA,

KALABURAGI BENCH

DATED THIS THE 5TH DAY OF NOVEMBER, 2024

PRESENT

THE HON'BLE MR. JUSTICE S.SUNIL DUTT YADAV

AND

THE HON'BLE MR. JUSTICE RAMACHANDRA D. HUDDAR

CRIMINAL APPEAL NO. 200109 OF 2014

BETWEEN:

1. KHAJA HUSSAIN
[redacted]

...APPELLANT

(BY SRI R.S. LAGALI, ADVOCATE)

AND:

THE STATE OF KARNATAKA
BY ZALAKI POLICE STATION
DIS: BIJAPUR

...RESPONDENT

(BY SRI SIDDALING P. PATIL, ADDL. SPP)

THIS CRIMINAL APPEAL IS FILED UNDER SECTION 374(2) OF CRIMINAL PROCEDURE CODE, PRAYING TO CALL FOR RECORDS OF THE COURTS BELOW AND SET ASIDE THE JUDGMENT AND ORDER OF CONVICTION AND SENTENCE DATED 22.09.2014 PASSED BY THE SPECIAL JUDGE AND II ADDL. SESSIONS JUDGE BIJAPUR IN SPL. CASE NO.1/2010 AND ACQUIT THE APPELLANT, IN THE INTEREST OF JUSTICE.

THIS APPEAL PERTAINING TO KALABURAGI BENCH HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 02.09.2024 AND COMING ON FOR PRONOUNCEMENT OF JUDGMENT AT PRINCIPAL BENCH, BENGALURU THROUGH VIDEO CONFERENCING, THIS DAY, ***S. SUNIL DUTT YADAV J.,*** DELIVERED THE FOLLOWING:

CORAM: HON'BLE MR. JUSTICE S. SUNIL DUTT YADAV
AND
HON'BLE MR. JUSTICE RAMACHANDRA D. HUDDAR

CAV JUDGMENT

(PER: HON'BLE MR. JUSTICE S. SUNIL DUTT YADAV)

This judgment has been divided into the following Sections to facilitate analysis:

I. BRIEF FACTS

The present appeal is filed by the sole accused seeking for setting aside of the judgment of conviction and order of sentence passed in Special Case No. 1/2010. The accused was convicted for the offences punishable under Sections 447, 366(A), 376, 506 of the Indian Penal Code and Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 [hereinafter referred to as 'the Atrocities Act']. The accused was sentenced to undergo simple imprisonment of three months for the offence under Section 447 of IPC, further sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs. 5000/- for the offence under Section 366(A) of IPC and in default of payment of fine, to undergo simple imprisonment of three months. As regards the offence under Section 376 of IPC, the accused was sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.1,00,000/- and in default of payment of fine, would undergo simple imprisonment of one year. The accused was further sentenced to undergo

rigorous imprisonment for two years for offence under Section 506 of IPC. As regards the offence under Section 3(2)(v) of the Atrocities Act, sentence of life-imprisonment with fine of Rs.50,000/- and in default of payment of fine, was sentenced to undergo simple imprisonment for six months. On deposit of fine amount, a sum of Rs.1,50,000/- was ordered to be paid to the victim.

2. The facts made out by the prosecution was that on 21.10.2009, at about 12:00 am at midnight/early hours of the next day, when complainant and other family members were sleeping in the farmhouse, the accused trespassed into the house, threatened the victim of doing away with her life if she opened her mouth, kidnapped her on a motor-cycle, took her to the farmhouse of C.W. 13 - Boramma W/o Siddappa Alur and confined her from 21.10.2009 till the midnight of 25.10.2009. It was alleged that during that period the accused forcibly raped her while threatening her with the knowledge that she was a minor and belonged to Scheduled Caste. Accordingly, it

was alleged that the accused had committed the offences punishable under Sections 447, 366(A), 376, 443, 506 of IPC and Section 3(2)(v) of the Atrocities Act.

3. Charge-sheet was filed, cognizance of the offence was taken and after hearing counsel for accused and prosecution, charges were framed. Prosecution has examined P.W.1 to P.W.16, got marked Exhibits P1 to P23 and M.O. 1 to 3 and closed M.O. 1 to 3. Exhibit D – series have also been marked as Exhibits D1 to D11. Exhibits D1 to D5 have been marked in the cross-examination of P.W.3 and Exhibits D6 to D3(b) have been marked during the cross-examination of P.W.4, Exhibits D7 and D8 have been marked in the cross-examination of P.W.7 and Exhibits D9 to D11 have been marked in the cross-examination of P.W.8. Under Section 313 of the Code of Criminal Procedure, statement of accused was recorded in which as regards all incriminating material, the accused has denied and has not chosen to lead any defence evidence.

II. TRIAL COURT OBSERVATIONS

4. The trial Court has framed points for consideration and answered the same in the affirmative. The trial Court as regards the age of the victim, has noticed that the complainant P.W.4 had herself given her age as 16 years while P.W.2 – her grandmother had given the age of the victim as 14 years and P.W.3 – her mother had deposed that her daughter (victim) was studying in 10th Standard. The trial Court also took note of the statement of the victim that her date of birth was 03.04.1994. It took note of the evidence of P.W.12 – Headmaster of Sri Siddeshwar High School who deposed that the date of birth of the victim was 04.07.1994. Copy of the extract of the birth certificate at exhibit P10 and transfer certificate at exhibit P11 was taken note of as tallying with the version of the victim as regards her age. Taking note of the above, the trial Court concluded that as on the date of the offence on 21.10.2009, the victim was less than 16 years, i.e., 15 years 03 months and 07 days. The Court also took note of the age as revealed by the

radiologist's report at Exhibit P8 by way of corroboration in coming to the above conclusion.

5. The trial Court after appreciating the evidence of P.W.2 – Laxmibai (grandmother of the victim), P.W.3 – Prabhavati (mother of the victim) and P.W.8 – Yallamma (sister of the victim), concludes that as on 21.10.2009, they along with victim were at the farmhouse. The trial Court has accepted their version that all of them went to sleep and when they woke up, they came to know that P.W.4 (victim) was not to be found.

6. While noticing the discrepancy in the evidence of the witnesses as regards in which portion of the house they were sleeping, the trial Court was of the view that such contradictions were insignificant and did not affect the testimony as regards the vital aspects.

7. The trial Court also took note of the deposition of P.W.4 (victim) regarding her being kidnapped on a motor-cycle and taking her to the house where she was

illegally confined and forcibly raped and thereafter brought and left near a canal by the accused. The trial Court noticed the further say of P.W.4 regarding her having lodged a complaint as per Exhibit P2 and having written it in her own handwriting. The court noted that this version of P.W.4 stood corroborated by the evidence of P.W.2 – Laxmibai (grandmother of victim), P.W.3 – Prabhavati (mother of victim), P.W.7 – Iranna (brother of victim) as well as P.W.8 – Yellamma (sister of victim).

8. The trial Court observed that P.W.4 has staked her honour and honour of her family in coming forward to make out a complaint and was of the opinion that the evidence of P.W.4 was corroborated by evidence of her grandmother, brother, mother and sister and no reason was made out to doubt her evidence.

9. The trial Court also took note of medical evidence of P.W.10 (Doctor) as well as certificate at Exhibit P7 and opined that the ingredients of the offence

under Section 376 of IPC stood proved and accordingly, has passed a judgment of conviction.

III. CONTENTIONS

10. The learned counsel for the appellant has contended that insofar as the finding of the trial Court that the victim was below sixteen years and accordingly, consent was irrelevant in terms of IPC Section 375 *sixthly* (reference to provision prior to it being substituted by Act No.13 of 2013), the burden of proof was on the prosecution to demonstrate that victim was below sixteen years was not established. It was contended that documents contemplated under Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 [hereinafter referred to as the 'Juvenile Justice Rules'] not having been produced, reliance on transfer certificate was legally impermissible to establish age of the victim to be below sixteen years.

11. It was further contended that the absence of consent was to be established by the prosecution. That in

the present case, the sole testimony of the victim was not consistent from the beginning till the end and that the very version in the complaint at Exhibit P2 regarding role of accomplices, viz., Chand Basha, Godappa Sayappa Honalli and Basavaraj Sayappa Honalli was retracted in the further statement at Exhibit D6 (d).

12. It was contended that there were contradictions amongst the witnesses who were the family members, viz., P.W.2 – Laxmibai (grandmother of victim), P.W.3 – Prabhavati (mother of victim), P.W.7 – Iranna (brother of victim) and P.W.8 – Yellamma (sister of victim). While P.W.4, the victim narrates that she was sleeping in the yard of the house at night, the other witnesses state she (victim) was sleeping inside the house along with them. It is further contended that the version of the victim that she was kidnapped at night without disturbing the others was simply not believable.

13. It was argued that the version of the prosecution that the victim was confined for four days in a

house during which period she was sexually assaulted, has not been proved by the prosecution. It is submitted that though the victim refers to Smt. Boramma, in whose house she was confined, the said witness being an important witness has not been examined as regards which adverse inference requires to be drawn against the prosecution. Accordingly, it is submitted that the prosecution has not proved and not discharged the burden cast.

14. Insofar as the offence under the Atrocities Act, it is contended that the offence must have been committed on the ground that the victim belongs to a particular community and mere knowledge of her community was by itself not sufficient under the provisions of the said Act as it stood prior to its amendment for conviction.

15. The Additional SPP - Sri. Siddaling P. Patil, on the other hand, would contend that absence of consent was evidenced by injuries on body of PW.4 (victim), that

the victim was below sixteen years as is evidenced from the transfer certificate at Exhibit P11. It is contended that once the prosecutrix has asserted that there was no consent, it was a burden on the accused to have proved that there was consent.

IV. ANALYSIS

16. Heard both sides.

17. In light of the above, the following points arise for consideration:

(i) Whether the judgment of conviction and order on sentence regarding offence under Section 3(2) (v) of the Atrocities Act, passed by the trial Court requires to be affirmed?

(ii) Whether the judgment of conviction and order of sentence as regards the offences under Sections 447, 366(A), 376, 506 of the Indian Penal Code, passed by the trial Court requires to be affirmed?

18. At the outset, it must be noticed that the Court sitting in appeal is required to re-appreciate the entirety of the evidence and may set aside the order of conviction upon such re-appreciation though such order must be passed with due care and caution while taking note of benefit that the trial Judge has of noticing the demeanor of the witnesses. Further, mere possibility of arriving at different conclusion on the basis of the same material may not by itself be sufficient to set aside the order of trial Court to arrive at a different conclusion as per the view of the appellate Court.

19. It needs to be kept in mind that the offence was committed on 21.10.2009 and the provisions of the Atrocities Act as well as Sections 375, 376 of IPC and 114A of the Indian Evidence Act, 1872, as on such date prior to the subsequent amendments is required to be taken note of and applied.

A. <u>RE: OFFENCE UNDER ATROCITIES ACT</u>

As regards the conviction for the offence under Section 3(2)(v) of the Atrocities Act, the trial Court has convicted the accused while observing that the accused took advantage of the victim belonging to oppressed class and misutilised such status in commission of the offence.

20. The fact that the accused belongs to Muslim religion while the victim belongs to the Scheduled Caste is not in dispute. The charge framed as regards the offence under the said Act is to the effect that the accused knowing fully well that the complainant belongs to Scheduled Caste, committed the offence punishable above ten years and thereby committed an offence under Section 3(2)(v) of the Atrocities Act.

21. Section 3(2)(v) of the Atrocities Act prior to its amendment by Act 1 of 2016 reads as follows:

> *"Commits any offence under the Indian Penal Code (45 of 1860) punishable with*

imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine"

(emphasis supplied)

22. Subsequent to amendment by Act 1 of 2016, the provision reads as follows:

"(v) commits any offence under the Indian Penal Code (45 of 1860) punishable with imprisonment for a term of ten years or more against a person or property knowing that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine;"

(emphasis supplied)

23. Prior to the amendment, the act complained of, if was committed on the ground that such person belong to the Scheduled Caste or Scheduled Tribe, offence was

committed, while post the amendment it is an offence if the committing an act which is punishable under law if the accused knew that such a person belongs to the Scheduled Caste or Scheduled Tribe. Thus subsequent to the amendment, mere knowledge that the victim belongs to Scheduled Caste or Scheduled Tribe is sufficient to attract the offence under Section 3(2)(v) of the Atrocities Act.

24. The observation made by the Apex Court in ***Asharfi v. State of Uttar Pradesh***[1] which highlights the difference between the earlier provision and amended provision are of relevance and relevant extracts are as follows:

> *"6 [Ed.: Para 6 corrected vide Official Corrigendum No. F.3/Ed.B.J./110/2017 dated 12-2-2018.]. In respect of the offence under Section 3(2)(v) of the SC/ST Prevention of Atrocities Act, the appellant had been sentenced to life imprisonment. The gravamen of Section 3(2)(v) of the SC/ST Prevention of Atrocities Act is that any offence, envisaged*

[1] (2018) 1 SCC 742

under the Penal Code punishable with imprisonment for a term of ten years or more, against a person belonging to Scheduled Caste/Scheduled Tribe, should have been committed on the ground that "such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member". Prior to the Amendment Act 1 of 2016, the words used in Section 3(2)(v) of the SC/ST Prevention of Atrocities Act are "… on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe."

7. Section 3(2)(v) of the SC/ST Prevention of Atrocities Act has now been amended by virtue of Amendment Act 1 of 2016. By way of this amendment, the words "… on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe" have been substituted with the words "… knowing that such person is a member of a Scheduled Caste or Scheduled Tribe". Therefore, if subsequent to 26-1-2016 (i.e. the day on which the amendment came into effect), an offence under the Penal Code which is punishable with imprisonment for a

term of ten years or more, is committed upon a victim who belongs to SC/ST community and the accused person has knowledge that such victim belongs to SC/ST community, then the charge of Section 3(2)(v) of the SC/ST Prevention of Atrocities Act is attracted. Thus, after the amendment, mere knowledge of the accused that the person upon whom the offence is committed belongs to SC/ST community suffices to bring home the charge under Section 3(2)(v) of the SC/ST Prevention of Atrocities Act.

8. In the present case, unamended Section 3(2)(v) of the SC/ST Prevention of Atrocities Act is applicable as the occurrence was on the night of 8-12-1995/9-12-1995. From the unamended provisions of Section 3(2)(v) of the SC/ST Prevention of Atrocities Act, it is clear that the statute laid stress on the intention of the accused in committing such offence in order to belittle the person as he/she belongs to Scheduled Caste or Scheduled Tribe community.

9. The evidence and materials on record do not show that the appellant had committed rape on the victim on the ground that she belonged to Scheduled Caste. Section 3(2)(v) of the SC/ST Prevention of Atrocities Act can be pressed into service only if it is proved that the rape has been committed on the ground that PW 3 Phoola Devi belonged to Scheduled Caste community. In the absence of evidence proving intention of the appellant in committing the offence upon PW 3 Phoola Devi only because she belongs to Scheduled Caste community, the conviction of the appellant under Section 3(2)(v) of the SC/ST Prevention of Atrocities Act cannot be sustained."

25. In the present case, it must be noticed that the charge framed by the trial Court reads as follows:

"Lastly, that you accused by kidnapping and committing rape on Scheduled Caste minor girl (complainant), you committed the offence punishable with more than ten (10) years on Scheduled Caste girl knowing full well that, the minor girl (complainant) belongs to Scheduled Caste, and thereby you committed an offence

U/s.3(2) (v) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, and within the cognizance of this Court"

26. The charge itself is based on the premise of knowledge while committing an offence punishable beyond ten (10) years on a Scheduled Caste girl. The charge itself is faulty and reflects the position post amendment Act 1 of 2016.

27. Though there are repeated statements made that the complainant belongs to Scheduled Caste while accused belongs to a Muslim community, the requirement that offence itself was committed taking advantage and to humiliate the victim as belonging to a certain community, as required under the un-amended provision, has not been proved. Prior to Amendment Act 1 of 2016, the commission of offence *is "… on the ground that such person is a member of Scheduled Caste or Scheduled Tribe",* there is no evidence to demonstrate that the offence was committed primarily on the ground that the

victim belongs to Scheduled Caste. Unless the above is satisfied, the prosecution cannot make out a case under Section 3(2)(v) of the Atrocities Act. The trial Judge has recorded at para 35 as follows:

> *"35. …Therefore, from oral reading of the entire evidence on record, it is clear that accused being a Muslim having access to the house of victim girl, he being a classmate of P.W-7 Iranna, brother of victim, took advantage of the same and the fact that they belonged to oppressed class, mis-utilised their status to appease them knowing fully well that they belonged to scheduled caste community and dishonoured them and the victim girl by mis-using the access given to him to the house being friend of P.W-7 Iranna. He could not have thought of that access to do this criminal act by coming in the odd hours of the night, thereby it amounts to criminal trespass as provided U/s 447 of IPC."*

28. The finding by the trial Court lays emphasis regarding knowledge that the victim belongs to Scheduled

Caste community, that by itself was insufficient as under the un-amended provision, offence must have been committed with intention to belittle the victim as belonging to the Scheduled Caste and also taking advantage of such oppressed status.

29. In the present case, the alleged offence of kidnapping and rape as is purported to have been committed taking advantage of pre-existing acquaintance of the accused being the friend of the victim's brother and has nothing to do with the social status of the victim. There is no evidence that the offence was committed taking advantage of her caste and accordingly, the judgment of the trial Court on such count does not stand legal scrutiny. Accordingly, it cannot be stated that the offence under Section 3(2)(v) of the Atrocities Act has been made out.

B. <u>RE: OFFENCE UNDER INDIAN PENAL CODE</u>

30. Insofar as the offence under Section 376 of IPC is concerned, the provision of Section 375 and 376 prior to its substitution by Act 13 of 2013, reads as follows:

*"**375. Rape**.—A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:—*

First.—Against her will.

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.—With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.—With or without her consent, when she is under sixteen years of age.

Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception.—Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape."

***"376. Punishment for rape**.—(1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both:*

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of

imprisonment for a term of less than seven years.

(2) Whoever,—

(a) being a police officer commits rape—

(i) within the limits of the police station to which he is appointed; or

(ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or

(iii) on a woman in his custody or in the custody of a police officer subordinate to him; or

(b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or

(c) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or

(d) being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or

(e) commits rape on a woman knowing her to be pregnant; or

(f) commits rape on a woman when she is under twelve years of age; or

(g) commits gang rape,

shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine."

31. Further provision under Section 114A of Indian Evidence Act, 1872 prior to substitution by Act 13 of 2013 also reads as follows:

***"114A. Presumption as to absence of consent in certain prosecutions for rape.**—In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of sub-section (2) of Section 376 of the Indian Penal Code (45 of 1860), where sexual intercourse by the accused is proved and the*

question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent."

32. In terms of the ingredients of the offence of rape under section 375 of IPC prior to amendment, an essential element is that a man is said to commit rape who has sexual intercourse with a woman; *"firstly - against her will; secondly – without her consent; thirdly.—with her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt …; sixthly – with or without her consent when she is under sixteen years of age;"*.

In light of the offence pertaining to the period of time in the year 2009, reference is made to the provision of Sections 375, 376 of IPC prior to amendment made to the provision by the Act 13 of 2013.

33. The concept of consent assumes importance as it is provided that sexual intercourse with a woman must be against her will, without her consent. However, if the victim is under sixteen years of age, consent would be immaterial and mere sexual intercourse would be sufficient to make out the offence of rape.

34. Accordingly, the age of the victim would be of relevance while interpreting the aspect of consent.

(i) <u>ACT OF SEXUAL INTERCOURSE</u>

35. However, the first ingredient of the offence as regards having had sexual intercourse with a woman under the un-amended provision of section 375 of IPC explanation, provides penetration is sufficient to constitute sexual intercourse necessary for the offence of rape.

36. The evidence in the present case at Exhibit P7 records the opinion as *"… 2. Recent signs of sexual intercourse – present in the form of injuries"*. The findings during the examination under the heading genital examination records as *"hymen – ruptured; vagina –*

edges are reddish brown and tender touch; vagina – admit two fingers with pain". In terms of Exhibit P9, the opinion of the doctor after examination of the accused is that "*… 4. On examination of Kaja Husain there is nothing to suggest that he is incapable of performing sexual intercourse".*

The evidence of the doctor i.e., P.W.10, who had examined the victim has reiterated the findings referred to above. It was also observed that the victim had stated that she had taken bath and changed clothes every day after the date of incident which perhaps explains the absence of seminal and stains.

Insofar as the lack of semen stain on the clothes, it must be noticed that the medical reports at Exhibits P6 and P7 read with the evidence of the doctors at P.W.10 and P.W.11 are by itself sufficient and the lack of positive report in the FSL test is due to the explanation by P.W.10 who states in the cross examination "*I have asked the victim to produce the clothes worn by her on the date of*

incident but she has stated that she has changed the clothes and washed". Accordingly, negative report of seminal stains would not take away weight that is to be attached to the reports at Exhibits P6 and P7.

Nothing damaging has been elicited during cross-examination. Similarly, P.W.11 is the doctor who examined the accused and has reiterated the findings of the medical report referred to above while withstanding the cross-examination. The above records and evidence when read in its entirety do make out material for arriving at the conclusion that there was sexual intercourse. The conclusion by the trial Court on such aspect requires to be accepted.

37. The allied question is as to whether such intercourse was against her will and without her consent.

38. The invocation of presumption under un-amended Section 114A of Indian Evidence Act would arise only where the relationship between the accused and the

victim is as contemplated under un-amended Section 376(2) of IPC under particular sub-section clauses (a), (b), (c), (d), (e) and (g). Under such circumstances, a presumption is raised that the victim did not consent if she states in her evidence before the Court that she did not consent. In the present case, no factual ground is made out for invocation of such presumption.

39. At the outset, as pointed out earlier, under IPC Section 375 - *sixthly,* if the victim is under sixteen years of age, consent would be immaterial.

(ii) <u>DETERMINATION OF AGE OF VICTIM</u>

40. As regards the age of the victim, it is the settled position of law that the same test of juvenility *vis – a–vis* an accused who seeks benefit of being a juvenile would be sufficient test to determine age of the victim. The Apex Court in **Jarnail Singh v. State of Haryana[2],** at para 23 has observed as follows:

[2] (2013) 7 SCC 263

"23. Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even of a child who is a victim of crime. For, in our view, there is hardly any difference insofar as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW, PW 6. The manner of determining age conclusively has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained by adopting the first available basis out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available would conclusively determine the age of a

minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the child concerned is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3) envisages consideration of the date of birth entered in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the

child concerned, on the basis of medical opinion."

41. Under Rule 12 of Juvenile Justice Rules, the documents that could be relied for the determination of the age are as follows:

"12. Procedure to be followed in determination of Age.—

xxx

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining—

(a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;"

42. In the present case, the two documents relied on by the prosecution are Exhibit P10 which is a certificate

issued by Shri Siddheshwar High School to the effect that the victim (P.W.4) was born on 04.07.1994. The said information is based on the reference to the school records and register. Exhibit P11 is the transfer certificate of the same school viz., Shri Siddheshwar High School, which shows the date of birth as 04.07.1994. The date of admission is shown as 01.06.2006 and date of leaving as 16.03.2009.

43. In Exhibit P11, Column - 8 details the 'last school attended' where it is mentioned as 'Government High School, Manankalgi, Indi Taluk'. Accordingly, it is clear that the document at Exhibit P10 and P11 relates to a declaration of age by a school which however is not the 'school first attended' as contemplated under Rule 12(3) (a) (ii) of the Juvenile Justice Rules. Exhibit P11 is a transfer certificate, such document also does not fall within the documents contemplated under Rule 12(3) (a) (i), (ii) & (iii). If that were to be so, both the documents cannot be relied upon and in the absence of any other

document, it can be stated that the prosecution has failed to prove that the age of the victim is below sixteen years so as to avail the benefit of absence of consent in case the victim is below sixteen years.

44. The Apex Court in **P Yuvaprakash v. State represented by Inspector of Police**[3] has observed as regards reliance on transfer certificate as follows:

> *"14. …Since it did not answer to the description of any class of documents mentioned in section 94(2) (i) as it was a mere transfer certificate, Ex C-1 could not have been relied upon to hold that M was below eighteen years at the time of commission of offence."*

45. Accordingly, the documents at Exhibit P10 and P11 falling outside the categories of documents contemplated under Rule 12 of the Juvenile Justice Rules and hence could not have been relied upon for the purpose of determination of age. In the absence of the stipulated

[3] 2023 SCC Online SC 846

documents, the prosecution could have moved the Court to make out necessary direction to the Medical Board for evidence regarding age of the victim as contemplated under Rule 12(3)(b) of Juvenile Justice Rules, which reads as follows:

> *"(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year."*

46. Without having the benefit of the opinion of the Medical Board, the prosecution has failed to prove that the age of the victim is below sixteen years and thereby cannot have the benefit of un-amended Section 375 – *Sixthly* of IPC which renders 'consent' inconsequential.

47. The offence of rape consists of sexual intercourse which should be against her will and without her consent. Insofar as the aspect of consent is concerned, many a time as in the present case, the prosecutrix has asserted that her consent has been obtained by putting her in fear of death or hurt. Nevertheless, the burden initially is cast upon the prosecutrix to assert absence of consent.

(iii) CONTRADICTIONS IN THE TESTIMONY OF THE VICTIM

48. No doubt the sole testimony of the prosecutrix if is consistent and admits of no contradictions, may be sufficient and be relied upon for the purpose of conviction as well. However, where there are not mere inconsistencies but contradictions which create doubt as to the version of the prosecutrix, depending on the entirety of the facts and attendant circumstances, prudence may require corroboration.

49. In the present case, the evidence of the prosecutrix is itself riddled with contradictions and her version itself is not consistent. It must be noticed that in terms of the complaint at Exhibit P2, the complainant (P.W.4) who is also the victim, has initially taken the stand that Chand Basha, Godappa Sayappa Honalli and Basavaraj Sayappa Honalli were also involved initially in taking her away from the house forcibly. The said complaint was made on 25.10.2009 as regards the incident on 21.10.2009. This version is sought to be retracted by further statement of the complainant at Exhibit D6 dated 27.10.2009, where she states that Chand Pasha, Godappa and Basavaraj have no connection with respect to the incident.

50. In her evidence when she was subjected to cross-examination and confronted with he further statement, at one point she states that as the accused Kaja Hussain had violated her modesty, and only out of anger, she had mentioned the names of Chand Basha,

Godappa Sayappa Honalli and Basavaraj Sayappa Honalli. The inconsistencies that emerge are further highlighted when she denies the portion of retraction marked as D6-(d) in Exhibit D6.

51. Her stand of giving up the case against the accomplices has cast a doubt regarding her version in light of direct contradiction for which no explanation is forthcoming. The prosecution could have examined the alleged accomplices, which could have helped unravel the true facts.

52. The victim (P.W.4) having initially mentioned that the accused took her away with the help of other accomplices viz., Chand Basha, Godappa Sayappa Honalli and Basavaraj Sayappa Honalli, as mentioned in the complaint at Exhibit P2, has subsequently in her further statement marked as Exhibit D6, has taken her stand that the accomplices did not have any role and were not connected with the incident. If that were to be so, whether the accused alone could have taken the victim from her

house without alerting the others raises a serious doubt as to the very alleged incident of kidnapping and may otherwise suggest the probability of the victim having voluntarily gone with her brother's friend who is the accused.

53. The absence of consent is not unequivocal. The injuries that are made out of abrasion on the victim at Exhibit P6 are insignificant and noticing that there was no such external injuries on the accused in terms of Exhibit P7, the theory of resisting the accused also stands on weak footing.

(iv) PROSECUTION HAS FAILED TO DISCHARGE ITS BURDEN

54. The investigating officer (P.W.16) in his evidence has stated that the statement of C.W.13 - Smt. Boramma was recorded. Smt. Boramma is the person in whose house the victim (P.W.4) was illegal confined by the accused. In the cross-examination of PW4, she admits that the accused had taken her to Smt. Boramma's hut where

during the time she was illegally confined and she was raped.

55. Though C.W.13 was the person who would have been an important witness to shed light on the version of the prosecution and perhaps depose regarding what happened during the four days of illegal confinement, as to whether there was opportunity to P.W.4 to run away, C.W.13 has not been examined. The reason for non-examining is not forthcoming. The evidence of Smt.Boramma would have been of relevance to indicate regarding consent or its absence. The prosecution by not examining the said witness and not explaining reasons for not examining such a vital witness, an adverse inference is required to be drawn against the prosecution.

56. The fact that the victim knew the accused who was her brother’s friend and was visiting the victim's house is a significant fact. The starting point of chain of crime was the allegation of kidnapping of the victim by the accused and three other accomplices. It must be noticed

that in the version of P.W.4 that she was sleeping inside the house while the victim's grandmother (P.W.2) has asserted that the victim's mother and other daughter were sleeping outside the house but the victim was sleeping inside the house. The victim's mother (P.W.3) states that her daughters and her mother (P.W.2) were all sleeping along with the victim outside the house.

57. There is no consistency regarding where the victim was sleeping as it has bearing on the facts as to how the victim could have been taken away at night without alerting the other family members. It is not believable that P.W.4 could have been taken away forcibly by the accused without alerting the others.

58. These contradictions and doubts in the prosecution's case accompanied with the absence of the prosecution in summoning C.W.13 – Smt. Boramma, who would have unravelled the happening on those crucial days when she was kept under illegal confinement, have rendered the case of the prosecution doubtful.

59. The question of lack of consent which is necessary for the offence of rape itself is in serious doubt. If that were to be so, it can be stated that the prosecution has not proved the case beyond reasonable doubt.

60. Once it is concluded that the alleged offence does not qualify under un-amended Section 375-*sixthly,* it is to be examined as to whether Section 375-*secondly* which states that "*A man is said to commit rape who, has sexual intercourse with a woman without her consent"* is applicable in the present case. It is also to be noticed under Section 375-*thirdly*, it would be possible to construe absence of consent where consent has been obtained by putting her in fear of death or hurt.

61. In the present case, the stand in the complaint that she was kidnapped has been disbelieved by virtue of the discussion supra at Paras 56 to 58. As regards her illegal confinement in the house of C.W.13, C.W.13 - Smt. Boramma is not examined.

The injury on the victim's body being insignificant and the absence of injury on the accused if taken into consideration, with other circumstances, the version that her consent was obtained by putting her into fear of death or hurt becomes doubtful.

(v) NO OBLIGATION ON THE ACCUSED TO LEAD EVIDENCE

62. Though it can be contended that the accused has not taken up any defence of consent and the response to the Cr.P.C. Section 313 statement is merely one of denial, it is to be noticed that the right of the accused to remain silent by itself may have the effect of casting the burden on the prosecution to prove that the sexual intercourse was one without consent.

63. It must be noticed that for invocation of presumption under Section 114A of the Indian Evidence Act, it is necessary that the offender and circumstances must fall within four corners of Section 376(2) of IPC as it stood prior to its substitution by Act 13 of 2013. It is not

the case of the prosecution that offence falls within the category of Section 376(2). If that were to be so, the absence of presumption under Section 114A of Indian Evidence Act would lead to placing the burden on the prosecution to establish absence of consent which is necessary to prove the offence of rape under Section 375 of IPC. Once such burden is fastened on the prosecution and the prosecution fails to discharge such burden, the case of the prosecution would fall on its own weight. There is no corresponding obligation on the accused to prove that there was consent which would result in fastening an onerous burden on the accused to prove that he was innocent which is contrary to the premise of presumption of innocence of the accused. There is no duty of the accused to prove a defence and his exercise of his right to remain silent would be sufficient where the prosecution itself is unable to prove its case.

64. Once such burden of the prosecution has not been discharged, then the accused is entitled for acquittal

as a result of the prosecution failing to discharge its burden beyond reasonable doubt. The right to remain silent would obviate the necessity of the accused to take a positive stand that there was consent. There was no legal obligation to set up the defence of consent by the accused. Accordingly, even without accused taking a stand regarding consent, the inherent contradictions regarding absence of consent that is required to be asserted by the prosecution may result in failure of the case of the prosecution to prove beyond reasonable doubt, leading to accused getting the benefit of doubt. The observations of the Apex Court in **Pankaj Singh Appellant(S) Versus The State Of Haryana Respondent(S)**[4] in the present context are relevant and reads as follows:

> *10. The condition precedent for applicability of Section 114A of the Evidence Act is that the prosecution must be for the offence of rape under various clauses set out therein under sub-Section (2) of Section 376 of the IPC. Clause (f) of sub-Section (2) of Section 376 of the IPC reads thus:*

[4]2024 Scc Online SC 474

*"376. PUNISHMENT FOR RAPE.—(1)****

(2) Whoever,-

…

(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

……"

11. *In this case, no charge was framed against the appellant-accused for the offence punishable under clause (f) of sub-Section (2) of Section 376 of the IPC. A perusal of clause (f) of sub-Section (2) of Section 376 shows that the punishment for the offence covered by sub-Section (2) of Section 376 is more stringent than the punishment for the offence under sub-Section (1) of Section 376. In the absence of the charge framed at any stage against the appellant-accused for the offence punishable under clause (f) of sub-Section (2) of Section 376 of the IPC, now, at this stage, neither the prosecution nor the victim can contend that clause (f) of sub-Section (2) of Section 376 of the IPC was applicable. Another important aspect which goes to the root of the matter is that in his examination under Section 313 of the Cr. P.C., the case that he was in a position of trust to the*

victim, was not put to him. In any event, the contention of the learned counsel appearing for the Prosecutrix that the appellant-accused was a person in a position of trust as far as the Prosecutrix is concerned is completely erroneous. There was no fiduciary relationship between the appellant-accused and the Prosecutrix, which will be apparent when we examine the Prosecutrix's evidence. Therefore, on the face of it, the presumption under Section 114A of the Evidence Act will not apply, and, therefore, the burden will be on the prosecution to prove that the sexual intercourse was without the consent of the Prosecutrix. We may also add here that in our jurisprudence unless there is a specific legislative provision which puts a negative burden on the accused, there is no burden on the accused to lead evidence for proving his innocence. The accused may have some burden to discharge in case of a statutory prescription, such as Section 114A of the Evidence Act. In this case, the burden was on the prosecution to lead evidence to prove the guilt of the accused beyond a reasonable doubt."

C. RE: TRIAL COURT OBSERVATIONS

66. It would be necessary to also point out the infirmities in the order of the trial Court as this Court in its

appellate jurisdiction is also considering validity of order of the trial Court. Though the Appellate Court is to re-appreciate the evidence which the Court has done as is evidenced in the discussion supra, it would also be necessary to deal with the legal infirmities of the order of the trial Court.

67. The conclusion of the trial Court as regards age of the victim has direct correlation with the aspect of consent in light of Section 375 sixthly of IPC which provides that the consent of the victim below 16 years would be of no relevance. The trial Court has concluded that the age of the victim was below 16 years referring to various documents without taking note of the legal mandate under Rule 12 of the Juvenile Justice Rules.

68. The trial Court has disregarded the contradictions in the evidence of P.W.2, P.W.3, P.W.8 and P.W.4 as regards where P.W.4 was sleeping at night. Though the trial Court has opined that these discrepancies are insignificant, however, as discussed supra at Paras 49

to 59 if the discrepancies are considered alongwith the statement of retraction at D-6(d) the conclusion legally permissible is entirely different. Accordingly, the appreciation of evidence by the trial Court is faulty.

69. The conclusion of the Court regarding consent of P.W.4 (victim) also requires to be differed with as the trial Court has heavily relied on the evidence of the Prosecutrix without noticing contradictions and inconsistencies as detailed supra.

69. Accordingly, the following:

ORDER

(i) The points for consideration are answered in the ***negative*** and the appeal is ***allowed***.

(ii) The judgment dated 20.09.2014 in Spl.Case No. 1/2010 on the file of the Court of Special Judge and II Additional Sessions Judge, Bijapur, is set aside and the accused / appellant is acquitted of the charges for offence punishable under Sections 447, 366(A), 376,

506 of the Indian Penal Code and Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

(iii) Consequently, bail bond and sureties if any executed by the accused shall stand discharged.

(iv) The fine amount, if any deposited by the accused shall be refunded to him.

(v) Registry to communicate this judgment to the trial Court for information and necessary compliance.

Sd/-
(S. SUNIL DUTT YADAV)
JUDGE

Sd/-
(RAMACHANDRA D. HUDDAR)
JUDGE

VP/VGR